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No. 93-1208

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY
Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE KANSAS SUPREME COURT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY LEWIS MCKINNEY
Petitioner Submitting Pro Se
1230 W. 28th Court
Lawrence, KS 66046
(913) 842 -7425

27 pp

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STATUTORY PROVISIONS INVOLVED

"*KANSAS SUPREME COURT RULE 141.*

No motion for summary judgment shall be heard or deemed finally submitted for decision until:

(a) The moving party has filed with the court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record); and

(b) Any party opposing said motion has filed and served on the moving party within twenty-one (21) days thereafter, unless the time is extended by court order, a

memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], *supra*).

The motion may be deemed submitted by order of the court upon expiration of twenty one (21) days, or expiration of the court ordered extended period, after filing and service on opposing counsel of the brief or memorandum of moving party notwithstanding the failure of the opposing party to comply with paragraph (b), *supra*. In such cases the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the

memorandum or brief of moving party. In determining a motion for summary judgment the judge shall state the controlling facts and the legal principles controlling the decision in accordance with Rule 165."

[Rule 141(b) quoted verbatim except for last sentence in Appellees' Brief of Cross Appeal (to the Kansas Court of Appeals), pp. 15-16]

KANSAS STATUTES ANNOTATED (K.S.A.) 60-208(d)

"Effect of failure to deny. Averment in a pleading to which a responsive pleading is required or permitted, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." [Essential part quoted verbatim in Appellees' Brief of Cross Appeal, p. 20. The required time for response is within 20 to 41 days. K.S.A. 60-215(a).]

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CORRECTIONS OF TECHNICAL ERRORS IN *Petition for Writ of Certiorari*

Table of Authorities. Constitution, Statutes, and Regulations Cited. p. vi: 28 U.S.C. Section 1254(1) should read 28 U.S.C. Section 1257(3).

III. **JURISDICTION**. (2), p. 2. Same change as immediately above.

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**REPLY TO RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

The Petitioners, Henry Lewis McKinney and Lillie Marie McKinney, herewith reply to Respondents' new arguments, errors and omissions contained in Respondents' *Brief in Opposition*. Petitioners hereby incorporate by reference their *Petition for Writ of Certiorari*.

Statement of the Case: Page 6, PAR. 2, LINES 6-7. Respondents' untimely opinions provide no statutory or other evidence that Respondents' contentions have any legal weight. The Court of Appeals ruled that the Respondents "technically" violated Ks. Sup. Ct. Rule 141. Under *Federal Rules of Civil Procedure*, Rule 56(e), and *Rules and Practice and Procedure of the United States District Court, District of Kansas*, Rule 206(c) and especially (g): "If a respondent fails to file within the time required by this rule, the motion will be considered and decided as an uncontested motion and ordinarily will be granted without further notice."

Statement of the Case: Page 6, 5 lines from bottom. Respondents did not move the trial court or the Petitioners to amend their pleadings, and therefore they failed to establish "a remedy in a breach of contract only."

In effect, Respondents had no remedies whatsoever, since damages were not contractually allowed, they did not mitigate their damages for many months, and specific performance was impossible with the sale of the Dicks' real estate.

Statement of the Case: Page 7, par. 1. Respondents fail to admit to this Court that in their first two purported motions for summary judgment, they did not comply with Rule 141(a) (they listed a few unsupported opinions instead of material facts) and the third motion was **NOT** even signed, which was grounds to strike it: Petitioners filed a Motion to Strike with that court, but Judge Nafziger ignored due process by failing to rule on it.

Statement of the Case: Page 7, par. 2. Respondents had, in effect, no viable motions for summary judgment. Moreover, Petitioners had numerous motions for summary judgment,

virtually all of which Respondents have intentionally overlooked.

Statement of the Case: Page 7, bottom, last two lines. Respondents' statement "a title opinion could not be completed" is in error.

ARGUMENTS

First Argument: Page 8, par. 2. Respondents' contentions do not give substance and application to their opinions. Judge Nafziger clearly admitted his bias and prejudice towards the Respondents by recusing himself. The Court of Appeals demonstrated its palpable bias and prejudice with many false statements, such as stating that there was a <u>requirement</u> for McKinneys to get a loan, when the only actual requirement was to <u>apply</u> for a loan with specific terms, which they did. To a slightly lesser, but noticeable, extent Judge Moroney revealed his bias and prejudice by failing to adhere to the unambiguous terms of

the contracts. For example, the 1988 contract required cancellation if the required mortgage commitment was not received by May 1, 1988, and it was not.

> "**MORTGAGE APPLICATION:** Buyers agree to apply promptly for a first mortgage loan on the above described property . . . with rights to prepay loan at any time without penalty, and with no more than two points. If Buyers have not been able to obtain a commitment for said loan on or before May 1, 1988, then this contract shall become null and void and the earnest money/down payments shall be returned to Buyers immediately." Record, I, 45.

The 1990 contract also failed when the Dicks did not furnish an unencumbered, marketable abstract of title by March 1, 1990 for the McKinneys' approval, which never came. Petitioners never approved the abstract of

title, despite the Court of Appeal's distortion of the 1990 contract's requirement:

> "13. **DEFAULT BY SELLERS:** In the event Sellers are unable or fail to furnish title [as discussed in paragraph 18] or possession as agreed in this contract, then, at the option of Buyers, this contract shall be terminated and all monies and considerations paid shall be refunded to Buyers." (Record, I, 56, par. 13)
>
> "18. **ABSTRACT OF TITLE:** Sellers and Buyers will furnish each other with Abstracts of Title to the above-described parcels of real estate certified to date showing merchantable title to said real estate, subject only to the exceptions herein set forth, if any. Buyers and Sellers shall then have a reasonable time to examine the same and make requirements in writing necessary to pass merchantable title as provided herein. In the event

any requirements are made, Sellers or Buyers shall have a reasonable time to correct said requirements needed to pass merchantable title. Buyers will deliver to Sellers the Abstract of Title and Deed to their property on or before February 10, 1990." Record, I, 58.

Moreover, the trial court in July 1993 allowed both contracts to die by granting Petitioners summary judgment on this point:

"66. Under Supreme Court Rule 141(b) if a litigant receiving a motion for summary judgment fails to answer after 21 days, the litigant "SHALL" be deemed to have admitted the uncontested contention of fact. Therefore all Defendants' contentions as a matter of law have been admitted and the Court is required to rule in favor of Defendants." Record, III, 856.

Essentially, due process requires fair treatment. *In re Robins Co., Inc.*, 107 F.R.D.

2 (D.C. Kan. 1985). For a hearing to afford an individual due process, a hearing tribunal must be impartial. *Constvet v. Boger*, 757 F.2d 223 (C.A. 10 Okla. 1985). A tribunal is not "impartial" if it is biased with respect to factual issues to be decided at hearing. Equal protection assumes that individuals who are similarly circumstanced shall be treated alike. *Hoffman v. U.S.*, 767 F. 2d 1431 (C.A. 9 Cal. 1985). The Fourteenth Amendment is applicable to all citizens. *Tyus v. Ohio Department of Youth Services*, 606 F. Supp. 239 (D.C. Ohio 1985). The rights created by the due process and equal protection clauses of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights. *Shelly v. Kramer*, 68 S. Ct. 836, 334 U.S. 1, 92 L. Ed 1166 (U.S. Mo 1948)

THE TRIAL COURT DID NOT EXCLUDE PETITIONERS' ARGUMENT THAT THE 1990 CONTRACT FAILED

BECAUSE RESPONDENTS FRAUDULENTLY MISREPRESENTED THEIR ROAD ACCESS. 'In fact, the trial court decided that the Petitioners' argument is valid: the 1990 contract failed. How does reading the trial court's decision lead to the opposite conclusion? Respondents do not tell us. Reading the contracts lead to the conclusion that the terms of those contracts caused them to fail.

The trial court Judge Nafziger undeniably, by recusing himself, acknowledged that Court's bias and prejudice regarding the 1988 contract as well as the 1990 contract.

The Court of Appeals, however, demonstrates *far worse bias and prejudice* than Judge Nafziger in his flaunting and shocking partisan advocacy of the Respondents' positions: that Court's fabrications, undeniable distortions and/or misquotations of facts, and overt attempts to re-write both contracts to favor Respondents, even though Petitioners'

award of summary judgment was not appealed. In effect, the Court of Appeals judge continued where Judge Nafziger left off. Moreover, neither the Court of Appeals nor Respondents tell us which of Petitioners' approximately 80 points the trial court alluded to in its award of summary judgment to Petitioners. The Respondents should explain why, if the trial court really wished Respondents to win, they didn't award the court summary judgment to Respondents in the first place? Perhaps the only way to resolve the apparent dilemma of Judge Moroney's decision is to recognize that when saying "to comport with the above mentioned rulings," the learned judge must have meant *only* the rulings allowing the Respondents to keep the $6,000.00, because ***as a matter of law*** under Rule 141, both contracts died. It is absurd to contend that Petitioners won, on the one hand, but on the other

hand, to state that Petitioners really lost after winning.

The Court of Appeals has admitted that the contingencies of the 1988 contract were ***NOT*** satisfied, which means that it died. The Court of Appeals has also admitted that the Respondents did not ***TECHNICALLY*** answer motions for summary judgment under Rule 141. The Respondents' failure to answer under Rule 141 killed both the 1988 and the 1990 contracts.

First Argument: Page 10, lines 7-10. Rule 141 is mandatory, not discretionary. A reading of Rule 141 establishes this point.

First Argument: Page 11, first par. Petitioners object only to the extreme bias and prejudice of the Court of Appeal's decision. When numerous "facts" turn out to be lies, any honest man would object to such a violation of truth. Respondents' opinions do not alter the truth.

Second Argument: Page 11, par. 1. The Court of Appeals raised only one objection to the K.C.P.A. argument; it was shown to be false. The first reference by the Petitioners to the K.C.P.A. was in their amended petition of February 1991. Respondents failed to answer. They conceded the argument then. No arguments since then have overturned Petitioners' averments. Respondents still have not read the amended petition. In November, 1991, they arrogantly admitted in court that they no longer read the filings!

Since June 1991 Petitioners have been discussing the K.C.P.A. with quotations from it. See *Appellees' Brief of Cross-Appeal*, pp. 32-34. The trial court's objection was based solely on the erroneous opinion that the K.C.P.A. did not deal with real estate, which is wrong as was the Court of Appeal's erroneous belief that the Dicks were not "suppliers" as defined by the act. The McKinneys' argu-

ments have not been overturned by incorrect opinions.

Third Argument: Page 13, par. 1. Under the 1990 contract, damages ***are not available to Respondents***. To invent damages when they are not available and after both contracts died is discriminatory; there is not a level field and the McKinneys are threatened with loss of property. The fact that the word "broad-based" is not used in Judge Moroney's decision is of no value. Respondents cry for damages from the 1990 contract, but damages for Respondents are not discussed in the contract; foreclosure is. Respondents ignored it.

Third Argument: Page 14, second par. from bottom. The Respondents were relying wholly on the award of $6000 to Respondents as the basis for appealing for damages. Said award, however, was actually based on false state-

ments by the trial court and the Court of Appeals regarding the 1988 and 1990 contracts. The 1990 contract stated clearly:

> "This instrument contains the entire agreement between Buyers and Sellers respecting the properties and duties of Buyers and Sellers in relation thereto. Anything not expressly set forth or referred to in this contract is null and void." *Record I, 58.*

Damages are **NOT DISCUSSED** in the 1990 contract and damages were therefore not agreed to and were null and void; **THAT** is the intent of the contract, and the trial court expected its decision to end the litigation, ergo, no money beyond the $6,000 was awarded to Respondents. Petitioners' *Petition for Writ of Certiorari*, App. C. Nevertheless, the fairy tale of damages for Respondents was subscribed to by the Court of Appeals, and flies in the face of the trial court's decision and intent to end the litigation. Awarding "damages" would be in direct opposition to the explicit, above quoted agreement of the 1990 contract as

composed by the parties. Failure by Respondents to mitigate their damages for many months also prevented damages.

Third Argument: Par. 3. The trial court's award to Petitioners of summary judgment included recognition of mandatory law, Rule 141. The trial court judgment cannot arbitrarily rewrite mandatory Rule 141, with opinions contrary to fact. If comporting with the judge's opinions are followed, those opinions must be grounded on facts, not errors.

Third Argument: Last Par. These are Respondents' opinions. Petitioners have the right to a fair assessment of their case, not blind bias and prejudice.

Third Argument: Page 14, last par. Had the Kansas Supreme Court actually checked out the Court of Appeals' Opinion, they would have easily discovered many of the egregious flaws uncovered in Petitioners' *Petition for Writ of*

p.15, par.2, l.7. Change *are* to *is*.

Certiorari. They include demonstrable fabrications, deceptions, and denial of due process and equal protection.

Fourth Argument: Page 15. Mr. McKinney's medical condition was discussed extensively from the first meeting of the Dicks and McKinneys in 1988. Many pages in Petitioners' filings, from many doctors, various laboratory tests, as well as sworn testimony on the stand by Mr. McKinney under oath, have discussed his problems extensively. Respondents never denied this evidence; however, they now question it by innuendo. Petitioners' various motions reflect the very serious nature of his complex kidney and related problems. His doctors, in fact, recommend he discontinue this case because of the detrimental effect on his health; so far that has been impossible.

Serious discrimination against a permanently disabled person has clearly occurred. Judge Nafziger even stated that trial would be

conducted in Mr. McKinney's absence during scheduled medical treatment! Hearings were held when Mr. McKinney was incapacitated.

The problems have been discussed in Petitioners' motions for summary judgment and Petitioners' amended Petition on February 1, 1991, which Respondents never answered.

The trial court under Judge Moroney technically awarded summary judgment on this issue also, but it has been ignored by the Court of Appeals. Whether Petitioners can or cannot contract separate contracts is immaterial to this litigation, for Petitioners agreed only to a unified interest, based on certain conditions and contingencies which had to be satisfied before consummation of the sale.

Fourth Argument: Page 15. Respondents have read the medical evidence. Dr. John Lee, B.A. Honors, Harvard, M.D. Minnesota, has stated that Mr. McKinney was mentally unable

to sign a contract for the sale of real estate. The Petitioner has been forced by circumstances to represent himself because Mr. Senecal has been inundating the court with frivolous filings. The courts have cooperated with him.

Fourth Argument: Page 16, top par. It is ironical that the Respondents have persistently discriminated against Mrs. McKinney in this litigation. They did not furnish her with any copy of the abstract of title, so she could check it out, but they now wish to saddle her with fictitious damages. Is that a level playing field? This is worse than the "we won but we lost" philosophy.

Conclusion: Page 16, par. 1. Petitioners have alleged and presented evidence on the constitutional applicability based on the Fourteenth Amendment, a charge articulated in a number of places, among others, *Motion for Continuance*, Record, V, 98-100.

CONCLUSION

The bias and prejudice of Judge Nafziger cannot be debated, and has been detailed in Petitioners' Affidavit of Bias and Prejudice and elsewhere; it led to his recusal. The intent of his court was to discriminate against *these pro se litigants*; he wore his blinders all during the case before departing.

Judge Nafziger also attempted to conduct a trial while Mr. McKinney was absent receiving medical treatment! And he conducted hearings when Mr. McKinney could barely see the dim outline of the Judge because of an accident to his eye. The Affidavit of Bias and Prejudice and elsewhere cite examples of his bias and prejudice towards a permanently disabled person.

Kansas law candidly states: "Our legal system cannot function on any basis other than equal treatment of all litigants. To have

different rules for different classes of litigants [pro se, permanently disabled, female, Negroes, the rich, et al.] is untenable." *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, at 595, 730 P. 2d 1109 (1986)

Dick v. McKinney demonstrates that constitutional ideals are often ignored in the real world of Kansas power struggles. It is unconscionable that a person needs to be rich or defended by counsel to receive justice because our Constitution is for the huddled masses, the ordinary, as well as the rich and famous .

DATED this 14th day of March, 1994.

Respectfully submitted,

Henry Lewis McKinney

Henry Lewis McKinney
Submitting Pro Se
1230 W. 28th Court
Lawrence, Kansas 66046
(913) 842-7425